FILE COPY

No. 916

In the Supreme Court of the United States

OCTOBER TERM, 1958

ROBERT E. FIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOSEPH F. GOETTEN,
JOSEPH KOVNER,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. 1–13) is reported at 263 F. 2d 758.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1959. (Pet. App. 14–15.) The petition for certiorari was filed on May 12, 1959. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the government may levy upon a taxpayer's property which was seized from his person after an arrest and thereafter ordered suppressed as

evidence in a criminal prosecution on the ground that it was the product of an illegal search and seizure.

STATUTES AND RULES INVOLVED

Sections 6321, 6331, and 6332 of the Internal Revenue Code of 1954, and Rule 41(e) of the Federal Rules of Criminal Procedure are printed in the Appendix, *infra*, pp. 8–9.

STATEMENT

The undisputed facts are set forth in the opinion below (Pet. App. 2–4), and can be briefly summarized as follows:

On September 21, 1957, agents of the Intelligence Division of the Internal Revenue Service, accompanied by the United States Attorney, conducted a raid on an apartment building in Miami, Florida, suspected of being the headquarters of a numbers racket operation. The officers had a search warrant covering the premises; they entered the premises and arrested several persons in the apartment, having found ample evidence of violation of the occupational tax and registration requirements of the wagering excise tax provisions of the Internal Revenue Code of 1954, Sections 4411, 4412, 4901(a), and 7203. The officers did not have a warrant for the arrest of the petitioner, but, since he was suspected of being the principal banker of the operation, an agent was stationed outside of the apartment to apprehend him. The petitioner drove up to the apartment during the raid, left his automobile, and was within two steps of the front door of the apartment building when the agent stationed outside, with drawn pistol, forced the peti-

tioner inside the apartment, where he was arrested and searched. Cash in the amount of $10,000 found on the petitioner's person was taken from him and seized as evidence.[1]

The petitioner was thereupon charged by information with wilful failure to register and to pay the federal occupational wagering tax. (R. 9.) The petitioner promptly moved under Federal Rules of Criminal Procedure, Rule 41(e), for the suppression and return of the property taken from him on the ground that the arrest was "accomplished with force, without a warrant, and without probable cause". (Pet. App. 3.) Following a hearing on this motion (R. 13–68), the District Court granted the motion to suppress the evidence, by order dated December 13, 1957 (Pet. App. 4, R. 68–69). On the same day, the Collection Division of the Internal Revenue Service at Miami, Florida, served on the person having custody of the cash (an agent of the Intelligence Division) a notice of levy with respect to wagering excise taxes due and owing by the petitioner in the amount of $45,954.63. (R. 71.)[2] Later, on February 3, 1958, the District Court entered a separate order directing that all of the seized property, including the $10,000 in cash,

[1] Other property not in issue here was also seized. (Pet. App. 3; R. 10.)

[2] It would appear from the amount of the unpaid taxes, that these taxes were not the $50 occupational tax imposed by Section 4411 of the 1954 Code, which was the subject of the criminal case, but were amounts of the 10 percent excise tax on wagers imposed by Section 4401. There is no question here as to the petitioner's liability for the amount of the taxes claimed in the levy.

forthwith be returned to the petitioner or to his designee. (R. 69–70.)

On February 19, 1958, before the property was returned to the petitioner, the Government moved to amend the return order with respect to the cash in order to protect the levy. (R. 70–71.)[3] On April 24, 1958, the District Court granted the motion and amended its return order to adjudge that the $10,000 was "properly levied upon by Collection Officers of Internal Revenue Service by levy upon Special Agents of the Intelligence Unit having custody of said $10,000" and directed that the cash should be retained "pending the disposition of the tax claims." (Pet. App. 4, R. 72–73.)[4] On the petitioner's appeal (R. 79–80), the Court of Appeals sustained the order and held, contrary to the petitioner's claim, that the Fourth Amendment to the Constitution of the United States did not "insulate" the petitioner's property from the reach of the federal tax levy (Pet. App. 1–13).

ARGUMENT

The decision below is correct and no substantial question of constitutional law requiring a decision by this Court is involved.

In holding that illegally seized property ordered returned to its owner, a delinquent taxpayer, is sub-

[3] The Government also moved to amend the return order with respect to the petitioner's automobile which it claimed was forfeited under Section 7325 of the 1954 Code. The court denied this part of the motion because the forfeiture was made upon an illegal seizure.

[4] The other property was returned to the petitioner (R. 74) and the information against him dismissed because of the suppression of the evidence (R. 77).

ject to levy for unpaid taxes, the court below has not in any way violated the petitioner's constitutional right under the Fourth Amendment to be free from illegal searches and seizures. *Trupiano* v. *United States*, 334 U.S. 699; *United States* v. *Jeffers*, 342 U.S. 48; *Welsh* v. *United States*, 220 F. 2d 200 (C.A.D.C.); Federal Rules of Criminal Procedure, Rule 41(e). (Appendix, *infra*, p. 9.) The instant decision is in accord with the decision of the Court of Appeals for the District of Columbia in *Welsh* v. *United States*, *supra*. Both courts have properly relied upon the repeated decisions of this Court in *Jeffers* and *Trupiano*, that illegally seized property, having been suppressed as evidence, may nevertheless be retained as contraband; and also upon the express provisions of Rule 41(e) itself, that illegally seized property, suppressed as evidence, "shall be restored unless otherwise subject to lawful detention."

The suppression order provided that the evidence "shall never be used at any time in any proceedings, Civil or Criminal," involving the petitioner. (Pet. App. 4; R. 68.) The tax levy does not authorize the use of the cash as evidence of the petitioner's liability for the taxes, if he contests the liability, but merely holds the money as security for payment of a determined or uncontested liability. Hence, the suppression order completely satisfied the judicial implementation of the Fourth Amendment to discourage lawless police action by suppression of illegally seized evidence, even at the risk of freeing guilty persons. *Benanti* v. *United States*, 355 U.S. 96; *Irvine* v. *California*, 347 U.S. 128; *Wolf* v. *Colo-*

rado, 338 U.S. 25. As the court below pointed out (Pet. App. 6–7), the suppression of illegally seized evidence is a judicial "sanction" intended to enforce the Fourth Amendment, which should not be extended to a case where its function is inoperative. There is no showing here that the collection officers of the Internal Revenue Service in any way participated in the illegal search, or that the search was in any way intended to discover leviable property of a delinquent taxpayer. See *Lustig* v. *United States*, 338 U.S. 74; *Byars* v. *United States*, 273 U.S. 28.

On the contrary, the record in this case plainly demonstrates that the arresting officers had only a single object in mind, the seizure of evidence to prove a criminal act. Since the officers acted illegally, the evidence has been suppressed. The wrong has been cured. As the court below further observed (Pet. App. 12), the "moment it [the cash] was put back into Field's hand it would have been subject to immediate levy." The petitioner's contention amounts to a claim that he is not only entitled to a return of the property, but to an immunity of that property from his obligation for unpaid taxes. The petitioner, however, asserts that he was at all times the rightful owner of the cash (Pet. 10); it was, therefore, at all times, properly subject to the payment of his tax debt to the United States, and within the broad sweep of the lien and levy provisions (Appendix, *infra*, p. 8) to secure payment of taxes. *Sims* v. *United States*, 359 U.S. 108.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH F. GOETTEN,
JOSEPH KOVNER,
Attorneys.

JUNE 1959.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., Supp. V, 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

* * * * *

(26 U.S.C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such prop-

erty or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * * *

(26 U.S.C., Supp. V, 6332.)

Federal Rules of Criminal Procedure:

RULE 41. SEARCH AND SEIZURE.

* * * * * *

(e) *Motion for Return of Property and to Suppress Evidence.*—A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

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